IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-1807, 98-2311

DOROTHY GAUTREAUX, et al.,	)	
	)	
Plaintiffs,	)	Appeal from the United
	)	States District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
CHICAGO HOUSING AUTHORITY,	)	
a corporation, and JOSEPH SHULDINER,	)	No. 66 C 1459
Executive Director, in his official capacity,	)	
	)	Chief Judge Marvin E. Aspen
Defendants.	)	

REPLY BRIEF OF DEFENDANTS-APPELLANTS CHICAGO HOUSING AUTHORITY AND JOSEPH SHULDINER

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Dated: August 17, 1998

CERTIFICATE OF INTEREST

Appellate Court No: 98-1807

Short Caption: Gautreaux, et al. v. CHA, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information in compliance with Circuit Rule 26.1. **NOTE: Counsel is required to complete the entire certificate and to use N/A for any information that is not applicable.**

(1) The full name of every party or amicus the attorney represents in the case:

Chicago Housing Authority, a municipal corporation

Joseph Shuldiner, Executive Director, CHA

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any; and

N/A

ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

(3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Skadden, Arps, Slate, Meagher & Flom (Illinois) is the only firm that has appeared in connection with the litigation at issue in the current appeal.

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The attorney furnishing the certificate must file an amended certificate to reflect any material changes in the required information. The text of the certificate (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

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Attorney's Signature: Nancy S. Eisenhauer

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Date: June 29, 1998

CERTIFICATE

Pursuant to Circuit Rule 32, I certify that the attached reply brief contains 6855 words.

Nancy S. Eisenhauer

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I. DISTRICT COURT IMPROPERLY INTERPRETED INJUNCTION

A. The Orders Are Appealable If Prior Injunctions Wrongly Interpreted

Plaintiffs argue that the Orders are not appealable because the district court properly interpreted the Injunction and Receivership Order based on the plain language of each. From this plaintiffs conclude that the Orders merely confirm the obvious rather than impose additional obligations on CHA. (Pl. Brief at 28-31) The opposite would also be true: if the district court's interpretations are wrong, this Court's jurisdiction is clear. The Injunction and Receivership Order were wrongly interpreted (see Section I.C. and III.A., respectively).

B. This Court Need Not Defer to District Court's Interpretations

Plaintiffs acknowledge that the district court interpreted prior injunctions based on what it considered the unambiguous language of each, (Pl. Brief at 33-4) which supports plenary review, but argue that the district court's experience in the litigation requires this Court to defer to the court's interpretations, citing Schering Corp. v. Illinois Antibiotics Co., 62 F.3d 903, 908 (7th Cir. 1995). (Pl. Brief at 32) The court's oversight of the litigation did not contribute to its interpretations. The court did not consider any of the factual and historical arguments that appellees advance in this Court, did not sort through numerous documents and evidence to reach its conclusions, made no findings of fact to support its interpretations, and did not consider the drafter's intent (even its own) in interpreting the prior injunctions. A mistake of law will be corrected on appeal regardless of the role of the judge in drafting the injunction. In re VMS Securities Litigation, 103 F.3d 1317, 1323 (7th Cir. 1996).

C. District Court Erred in Interpreting the Injunction

1. The Injunction Should Be Narrowly Construed

The Injunction can and should be interpreted to exclude HOPE VI replacement housing from its coverage to avoid separation of powers and federalism concerns. (CHA Brief at 34, citing Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1019 (7th Cir. 1984) (en banc)) The court disregarded these basic principles, and ignored this Court's adamance that mandatory judgments against state and local government should be narrowly construed or modified to minimize the intrusion of the federal judiciary into local governmental affairs. See, e.g., David B. v. McDonald, 116 F.3d 1146, 1150 (7th Cir. 1997):

> [The district court] must either construe or modify the decree forthwith to permit Illinois to reallocate tasks among its agencies and to reduce the services offered to persons adjudicated delinquent. Then [the district court] must determine whether a substantial federal claim supports the decree as a whole; if not, the entire decree must be lifted and the task of shaping public policy be restored to persons today holding political office–subject only to whatever limitations federal law and the Supremacy Clause place on the operation of the state's social welfare system.

The CHA argued below that the district court could (and should) construe the Injunction to permit the CHA to exercise local authority to determine public housing policy in Chicago under HOPE VI. The CHA, however, is not seeking to vacate the Injunction. (See Transcript at p. 36, line 5 - line 25)

2. The Injunction Cannot Properly Be Interpreted Based On the Definition of "Dwelling Unit"

It is undisputed that the district court based its interpretation of the Injunction solely on a portion of the Injunction's definition of "Dwelling Unit." But that is not enough.

The Injunction is ambiguous with regard to HOPE VI given the undisputed facts that: the concept of "replacement housing" did not exist at the time that the Injunction was entered; the Injunction does not explicitly speak to its treatment of "replacement" housing; the housing stock to be replaced by HOPE VI replacement units is located in the Limited Areas; the Injunction does not govern the CHA's activities in the Limited Areas; and the Injunction does not require the CHA to demolish, retire over time, or otherwise deplete the housing stock located in the Limited Areas. (See CHA Brief at 15-19)

The definition of Dwelling Unit may be sweeping, but the term was defined in the context of an Injunction that created the Gautreaux scattered site program, which is well defined and well known. The Gautreaux program is not a HOPE VI revitalization plan simply because both provide for the building of public housing. The Injunction evinces no intent with regard to HOPE VI whatsoever.

Plaintiffs assert that the fact that HOPE VI did not exist in 1969 is irrelevant. (Pl. Brief at 34, citing Wilder v. Bernstein, 49 F.3d 69, 73 (2nd Cir. 1995)) Wilder does not stand for the proposition; the Wilder Court considered the issue and concluded that the fact the program did not exist when the injunction was entered was indeterminative because similar programs existed and the agency could have anticipated the creation of the program.

3. The Court May Consider Some Extrinsic Factors

Plaintiffs argue that a court may not consider "extrinsic factors" when interpreting an injunction. (Pl. Brief at 34) However, in Youakim v. McDonald, 71 F.3d 1274, 1283 (7th Cir. 1995), this Court emphasized the need to "pay particular heed to the nature of the dispute in which [the injunction] originated," and to consider a myriad number of factors relating to the entry of the Injunction. The "extrinsic" factors cited by the CHA include exactly those factors set forth in Youakim. (See CHA Brief at 15-21)

Plaintiffs cite Ahern v. Bd. of Educ. of the City of Chicago, 133 F.3d 975, 981 (7^{th} Cir. 1998), but fail to reference the following proposition set forth therein:

> Even when the terms of the instrument are clear, extrinsic evidence may be used in the rare situation where a latent ambiguity exists, meaning the terms of the contract cannot be applied because they do not fit the factual circumstance to which they are addressed.

Id. (citations omitted). The court should have examined the factual circumstance to see if the terms of the Injunction "fit." It is undisputed that they do not fit. (See Transcript at p. 42, line 25 - p. 44, line 10; Cf. Id. at p.4, line 21 - p. 8, line 18)

4. Plaintiffs' Extrinsic Factors Are Irrelevant

While plaintiffs argue that the court need not look beyond the unambiguous language of the Injunction, they nevertheless reference extrinsic factors in support of their interpretation. (Pl. Brief at 35-38) These are not the extrinsic factors identified in Youakim.[1] Moreover, plaintiffs introduce fact issues that were not decided by the district court and rely on many documents that were not part of the record when CHA filed its opening brief in this Court.[2] CHA cannot respond *in its reply brief* to each of the plaintiffs'

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1 Cf. Matthews v. Sears Pension Plan, 144 F.3d 461, 467 (7^{th} Cir. 1998)(extrinsic evidence must not depend on the credibility of testimony of an interested party).

2 That record, which was described in orders entered by the district court on April 21, 1998, and June 10, 1998, included only the basic documents relating to the Orders (continued...)

and receiver's 20 page "statements of the case," which rely on references to the expanded record on appeal.

5. CHA Does Not Agree That the Injunction Applies to HOPE VI

One of plaintiffs' fact-based argument is that CHA has agreed in the past that the Injunction and the Receivership Order govern HOPE VI. This is hotly disputed. (See, e.g., SAR-16-18, CHA Mem. at 16-18; Pl. Rsp. Mem. at 6-8; SAR-97-101, CHA Reply Mem. at 12-16)[3] Plaintiffs and receiver argue that CHA entered into an agreements as to the receiver's role in HOPE VI projects, (Pl. Br. at 37) but contracts would be unnecessary if the receiver was already granted that authority under the Injunction and the Receivership Order. (Despite implications to the contrary, the CHA and the receiver never executed the agreement that would have named the receiver as the development manager at Cabrini. See Pl. Brief at 16-17) None of this would have occurred if the "agreements" that plaintiffs tout actually existed.

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2 (...continued)
being appealed. Almost one month after CHA filed its first brief in this appeal, plaintiffs asked the district court to add to the record on appeal and, over CHA's objection, the record was substantially expanded. Plaintiffs added all of the substantive documents in the record from June 1993 to the present, including documents filed after the May Order was appealed, and a substantial number of documents from the period 1983-93.

3 Because the record on appeal now contains numerous documents, the CHA has filed an appendix containing its opening memorandum and reply memorandum, as well as HUD's response to CHA's motion, all of which were included in the original record on appeal in connection with the motion to clarify. Citations to the accompanying appendix appear as "SAR-___."

Notably, plaintiffs, in March of 1997, asked the District Court to modify the Injunction to govern Section 8 on the ground, inter alia, that there is an "impending exhaustion of scattered-site funds." (SAR-98, CHA Mem. at 13) If plaintiffs in March 1997 believed that CHA's HOPE VI funds (all of which remain unspent) were available to fund the Injunction's scattered site building program, plaintiffs would have had no need to make that statement or even file the motion to add the Section 8 program to the Injunction.

Plaintiffs and the receiver have had no connection with CHA's HOPE VI funds or the plans for those funds except where approximately $42.9 million of HOPE VI funds were awarded to the CHA as a set-aside by HUD for the Gautreaux plaintiffs. (CHA Brief at n.12) HUD used these funds to comply with its consent decree obligations to plaintiffs. Beyond the HOPE VI application for the Gautreaux set-aside, neither plaintiffs nor the receiver participated with CHA in preparation of any other HOPE VI application until after the May Order was entered. That Order directed CHA to coordinate its 1998 HOPE VI application with the receiver and to cooperate with the receiver. That was a first.

Plaintiffs imply an estoppel argument, (Pl. Br. at 37) based on CHA's alleged treatment of the Injunction as applying to HOPE VI. CHA's past interpretations of the Injunction and HOPE VI are not controlling.[4] Estoppel does not lie against government officials who make mistaken representations (either oral or written) about the availability of

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4 Plaintiffs' and the receiver's implication that HUD agrees with their arguments on appeal are directly contradicted by the response filed by HUD with the District Court (included in accompanying appendix).

federal funds for specific activities. Office of Personnel Management v. Richmond, 496 U.S. 414, 427-29 (1990).

6. CHA's Duty to Affirmatively Administer Its System to Disestablish Segregated Public Housing Is Irrelevant and Unenforceable

Plaintiffs argue that the Injunction's requirement that the CHA "affirmatively administer its public housing system in every respect (whether or not covered by specific provisio of this judgment order) to the end of disestablishing [its] segregated public housing system," indicates that the Injunction governs HOPE VI. (Pl. Brief at 33). This "extremely broad reading" of the Injunction was rejected by this Court in 1991. (SAR-14, CHA Mem. at 14)

The duty to administer the system to disestablish segregated public housing, to the extent it can be discerned and judicially enforced, necessarily is fulfilled when applied to CHA's HOPE VI activities. HOPE VI is a congressionally mandated program that is subject to the Fair Housing Act. (CHA Brief at 19, citing NAACP v. Secretary of HUD, 817 F.2d 149, 155 (1st Cir. 1987) (Breyer, C.J.)) The Injunction seeks to achieve desegregation by creating the opportunity for African American public housing residents to live in the General Area. This is not the only way to achieve desegregation. The Injunction's remedy must give way to the congressional remedy.

II. THE ORDERS EXCEED THE AUTHORITY OF THE FEDERAL COURT

A. February Order Violates Principle of Separation of Powers

The district court avoided the separation of powers problem raised by the intersection of the Injunction and HOPE VI by interpreting HOPE VI so as to avoid a conflict with the statute.[5] The court held that because HOPE VI *permits* the CHA to choose the one building plan that the Injunction *imposes*, HOPE VI and the Injunction are compatible; therefore, it does no violence to the statute to *require* the CHA to use its HOPE VI funds to build public housing in accord with the Injunction's one-to-one building requirement. The court's interpretation ignores entirely the scope, operation, and purpose of the statute. Building half of all replacement units in the General Area would divert, mandatorily, HOPE VI funds and other resources from the neighborhood that is to be revitalized, deprive residents of the range of choice of where to live provided by HOPE VI, and impair those residents' right to meaningfully participate in the planning process. The February Order improperly directs CHA to use its HOPE VI monies to fund the Injunction's mandatory, existing public housing program.

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[5] While courts should construe statutes to avoid constitutional problems, they should also do so with regard to their own injunctive orders. In this case, it is the Injunction that should be construed to avoid constitutional problems–not Congress' enactment--because the court's interpretation of HOPE VI eviscerates the HOPE VI program.

B. The Injunction Is In Conflict With HOPE VI

1. The Locational Requirements Of Injunction Are Not Optional

The Injunction requires CHA to build housing in accord with its one-to-one locational restrictions. The February Order holds that HOPE VI replacement housing must "conform to the [Injunction's] locational requirements." (A-16) This is unambiguous. Plaintiffs now claim that the "*scattered-site development technique [] was the original focus of, and remain[s] a current option under, the judgment order.*" (Pl. Brief at n.7 (emphasis added)) Plaintiffs are stating that the locational requirements of the Injunction are optional. This statement is incredible, but it is essential to their argument that there is no conflict between HOPE VI and the Injunction. Plaintiffs do not want an Injunction that requires half of all public housing to be built in the General Area.[6]

Instead they want an injunction that would allow CHA to build public housing anywhere in the Limited Area, and especially in any census tract that can be considered "revitalizing," but on the condition that the building plan *is approved by the Gautreaux Court.* If such approval is mandated (which it would be if CHA is forced to apply for waiver of the locational requirements), the court would first require CHA to negotiate every aspect of the plan with plaintiffs (Transcript at 32) and the receiver would be kept in business until the last HOPE VI dollar is spent.

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[6] In the past few years, plaintiffs have given their permission to the CHA (subject to court approval, i.e, the waiver process) to use non-HOPE VI funds, provided to plaintiffs under the HUD consent decree, to be used in the Limited Areas. (Pl. Brief at 12-13) <u>See</u> <u>also</u> Section II.B.2., below. Plaintiffs also did so with regard to their own HOPE VI set-aside. (Pl. Brief at 18)

2. Building In the Limited Area or Revitalizing Areas Would Require a Waiver of the Injunction

Plaintiffs argue that the Injunction "has been flexible enough to authorize replacement housing in a considerable variety of locations" in the Limited Areas. (Pl. Br. 46-47) All of this building was done with HUD money provided to plaintiffs for purposes of the Gautreaux remedy in order to complete HUD's obligation under the consent decree with plaintiffs to fund 7100 units of public housing, which, under the consent decree, could be built in a "Revitalizing Area." See, e.g., Gautreaux v. HUD, 523 F.Supp. 665, 668-69 (N.D. Ill. 1985) (relief against HUD was "in sharp contrast" to relief under Injunction, which does not provide for building in revitalizing areas). Because it was Gautreaux money, the HUD Consent Decree allowed building in Revitalizing Areas, and plaintiffs were willing to build at Horner, ABLA and even Lawndale, plaintiffs and CHA negotiated agreed orders that waived the locational requirements of the Injunction in order to proceed. The Injunction is not "flexible."

Plaintiffs cite to Article X of the Injunction for the proposition that the district court can issue orders "supplementing the terms of this order." (Pl. Br. at 47) Article X is the section of the Injunction that indicates that the district court retains jurisdiction over the case to enforce the injunction. It cannot expand the jurisdiction of the district court beyond its traditional jurisdiction to enforce or modify injunctions. As Article X indicates, if the change in terms constitutes a modification of the Injunction, then the party seeking the change would be required to file a "proper notice and motion." A "waiver" of an Injunction cannot be a "supplemental term," nor does it render the injunction's requirements "optional."

3. The Waiver Process Substitutes the Judiciary for Local Government

Plaintiffs note that CHA acknowledges that it could "seek a revitalizing area designation or waiver as it has many times done," but plaintiffs disagree that requiring CHA to make that choice is interference exceeding judicial power. (Pl. Brief at 47) It clearly constitutes such interference. The Injunction does not provide the standards under which the "option" to build in the Limited Area might be exercised or the terms on which the CHA is entitled to a waiver. There is no subsidiary goal in the Injunction which, if met, would justify a waiver. If the standard is, "does the plan promote desegregation," or "is the plan consistent with the goal of the Injunction," the standard is vague, does not inform CHA as to what is required of it, and is unenforceable.

In the absence of a standard, CHA's ability to obtain a waiver would rest *entirely* on the inclination of the federal court. The court could withhold a waiver until, for example, the plaintiffs and the receiver agreed that the plan "furthers desegregation." There is no doubt that the receiver and the plaintiffs, could dictate, through artful negotiation, the entire HOPE VI plan for each revitalization project. That forcibly denies CHA its governmental rights, which are not enjoined by the district court or transferred to the receiver, and allows the federal court to run CHA.

4. The Injunction Conflicts With Federal Policy To Permit Public Housing Residents To Live On-Site

The Injunction imposes a mandatory building program and the selection of sites is completely up to the receiver; it does not provide for tenant choice and participation in planning. In contrast, HOPE VI requires collaboration and provides public housing tenants with the right to meaningfully participate in the planning of their community and to choose where they will live, including on-site.

Federal policy is set by HOPE VI and the Site and Neighborhood Standards provisions of HUD's PHA Eligibility and Program Requirements. Under those provisions, public housing tenants who live in housing projects targeted for demolition by HOPE VI can choose to remain "on-site," that is in a replacement unit built in the neighborhood in which the housing project is located:

> Notwithstanding any other provision of this paragraph [preventing the siting of new construction projects in an area of minority concentration], public housing units constructed after demolition of public housing units may be built on the original public housing site, or in the same neighborhood, if one of the following criteria is satisfied: . . . (ii) In the case of replacement of a currently occupied project, the number of public housing units being constructed is the <u>minimum number needed to house current residents who want to remain at the site</u>.

24 CFR § 941.202(c)(2)(ii) (attached hereto as Exhibit A; emphasis added).

5. HOPE VI Requires Tenant Participation in Planning

The Low Income Housing Act requires a HOPE VI application to be developed in consultation with the public housing tenants who live in the HOPE VI targeted neighborhood:

The Secretary may not approve an application [unless]:

> (1) the application from the public housing agency has been developed in consultation with tenants and tenant councils, if any, who will be affected by the demolition or disposition, and the [relevant tenant groups] . . . have been given appropriate opportunities to purchase the project or portion of the project covered by the application . . ..

42 U.S.C. § 1437p(b)(1). In Cabrini-Green Local Advisory Council v. CHA, 1997 U.S. Dist. LEXIS 625 (N.D. Ill. 1997),[7] Judge David H. Coar held that this Section is applicable to HOPE VI and enforceable by CHA tenants, and provides tenants with a right to "meaningful" consultation.

Plaintiffs assert that HOPE VI does not provide public housing tenants with choice because it does not provide them with veto power over the actions of the local public housing authority (an odd position for plaintiffs to take). (Pl. Brief at 39) Tenants do not have absolute veto power; however they do have the power to enforce the plan that was developed in "meaningful" consultation with the CHA and the City. As Judge Coar held:

> It would be inconsistent with the purposes of HOPE VI to allow a Consolidated Plan to be developed (with input from public housing residents), but then to allow a public housing authority to simply ignore that plan. Giving the residents of public housing projects enforceable rights against the CHA to comply with the Consolidated Plan will further the purposes of HOPE VI.

(CHA Brief, Exh.B.12) CHA's obligation is clear. It must confer and develop a revitalization plan with the residents.

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7 (See CHA Brief at Exh.B.13)

6. HOPE VI's Provision for Choice and Local Control Is A Requirement of HOPE VI, Not A "Gap" That a Court Properly May Fill

Plaintiffs, however, argue that the February Order does not affirmatively rewrite HOPE VI, but merely fills "gaps" in the HOPE VI statute -- given the statute's relative lack of substantive requirements. (Pl. Brief at 49) The fact that plaintiffs view HOPE VI's provisions for choice and decision making at the tenant level as a "gap" only highlights the underlying conflict between HOPE VI and the Injunction.

7. The Injunction Provides Tenants With Only One Desegregation Option

The Injunction provides plaintiffs with only one desegregation option and no option for urban revitalization, while HOPE VI requires CHA to provide tenants with more than one option for desegregation plus revitalization of their community. Plaintiffs had the opportunity to choose a desegregation plan – thirty years ago – when the court entered the Injunction. HOPE VI offers tenants and local communities multiple, direct, and contextual options, and it does so by *requiring* housing authorities that seek HOPE VI funds to collaborate with its tenants and local communities. It is the "lack" of substantive guidelines in HOPE VI -- when played out against the backdrop of the Fair Housing Act, the Low-Income Housing Act, and other rules and regulations -- that guarantees that tenants and local communities will have a direct choice in determining where to place public housing, and that the choice will not be made on the basis of race.

In a context of limited resources, the Gautreaux Injunction created choice; today, with resources such as HOPE VI available, the Gautreaux Injunction represents a limitation on tenant choice. By imposing the Injunction's choice onto the CHA's HOPE VI program, the court improperly narrowed Congress' HOPE VI program. Cf. Roe v. Casey, 623 F.2d 829, 831, n5 (3rd Cir. 1980) (narrower state law that limited use of Medicaid funds for one type of abortion held to conflict with "broader" Hyde Amendment that permitted states to make two types of abortions available because legislative history made clear that Hyde Amendment set forth congressional funding scheme). As the legislative history indicates, HOPE VI's breadth conflicts with the court's narrow requirement that the CHA use its HOPE VI funds in accord with an existing and mandatory housing program. (See CHA Brief at 9-10)

C. An Injunction That Orders A Defendant To Use Funds In Contravention Of a Congressional Mandate Is Improper

Plaintiffs' second response to CHA's separation of powers argument is that CHA has been found guilty of a constitutional violation and must fulfill its obligations under the Injunction unless and until it successfully moves to modify the Injunction. (Pl. Brief at 47-48) This argument is non-responsive.[8] The district court has the authority to enforce the remedy provided to plaintiffs in 1969 and to compel CHA to seek federal funds that are eligible for the Injunction's program; however, even the district court has recognized that the Injunction does not require Congress to fund that program. (See A-14, February Order at 3

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[8] CHA has not argued that it is released from the court's jurisdiction or the obligation to comply with the Injunction; instead, when the Injunction is interpreted as governing HOPE VI, the Injunction exceeds the court's remedial powers.

("[I]f construction funds permanently dry up. . .then [the Injunction's] particular effort to desegregate public housing in Chicago will come to an end."))

Plaintiffs claim that the funding source is irrelevant to the proper interpretation of the Injunction. (Pl. Brief at 37-38). That would ignore congressional intent on how federal funds are to be spent. Congress created a new public housing program that places certain conditions on the use of federal funds -- conditions which the Injunction's mandatory building program do not and cannot meet. The court cannot make the Gautreaux program eligible for HOPE VI funds by "rewriting" HOPE VI *in Chicago* to accommodate the Injunction's proscriptions. The court's exercise of the equitable power granted to it under the Constitution "is limited by a valid reservation of congressional control over funds in the [United States] Treasury." Walker v. U.S. Department of Housing and Urban Dev., 912 F.2d 819, 829-30 (5th Cir. 1990), quoting Office of Personnel Management v. Richmond, 496 U.S. 414, 425 (1990). HOPE VI is a valid reservation of congressional control over federal funds.

The court's remedial powers are limited even where a change in congressional funding policy has the effect of withdrawing federal funds from a public housing program set forth in a remedial decree in pending litigation–as long as the change in funding policy does not vacate the decree, ban the activities envisioned under the decree, or negatively implicate a constitutionally protected interest. See Id. at 825-3. HOPE VI does not vacate the Injunction or ban the building of public housing pursuant to the Injunction's scattered site building program. It creates a new program with new funding requirements. Further, plaintiffs do not have a constitutionally protected interest in continued subsidization by the federal government of their remedy against CHA. See Id. at 830.

D. February Order Pays Inadequate Heed To Principle of Federalism

CHA's federalism arguments, like its separation of powers arguments, assume arguendo that the court's interpretation of the Injunction is correct. The cases cited by plaintiffs, which discuss the power of the federal court to formulate a remedy in the first instance, are not at issue. (Pl. Br. at 43-44). Clearly the federal court can order a state or local agency that is in violation of the Constitution to take certain actions. However, as plaintiffs' cases indicate, a federal court should make every effort to tailor the remedy to both provide relief and avoid unnecessary intrusions into state sovereignty, even in the face of a constitutional violation. See, e.g., Missouri v. Jenkins, 495 U.S. 33, 51 (1990) ("[O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.").

Here, the relief provided by the court (subjecting HOPE VI to the Injunction) actually harms plaintiffs while intruding upon state sovereignty. Plaintiffs are harmed, rather than helped, because the imposition of the Injunction's locational restrictions onto the CHA's HOPE VI programs limits the choices provided to plaintiffs -- where the problem to be remedied in the first instance is the consequence of a lack of choice. The state's sovereignty is intruded upon because, despite the fact that the CHA is attempting to create Chicago's public housing policy by lawfully and properly participating in a federal program, the federal court has nevertheless subjected the program to the terms of a mandatory injunction. Cf.

ACORN v. Edgar, 56 F.3d 791, 798 (7^{th} Cir. 1995). In this instance, HOPE VI -- *without restriction by or interference from the court* – better addresses plaintiffs' harm while permitting the state to retain its sovereignty. Accordingly, the court's order pays inadequate heed to the principle of federalism, and should be vacated on that ground.

III. THIS COURT SHOULD VACATE THE MAY ORDER AND DISREGARD THE RECEIVER'S ARGUMENTS

A. Receivership Order Was Improperly Interpreted

1. Nature of the Receivership Order Not Considered

The Receivership Order was entered in 1987 because CHA had been unable to build units in the General Area. The district court interpreted the Order to apply to HOPE VI housing development by focusing on a portion of the sweeping definition of "scattered site program." The court concluded that the sweeping definition unambiguously included HOPE VI replacement housing, and ignored the common sense fact that the scattered site program was a specific building program to add new housing in the General Area, whereas HOPE VI provides for replacement units in lieu of demolished high-rise projects in the Limited Area. The district court did not consider the intent of the Receivership Order, even though it was the court's own order, nor did it inquire whether the Order was intended to apply to a newly enacted funding statute designed for a purpose much broader that building public housing in the General Area.

2. CHA's Governmental Powers Not Transferred to Receiver

The Receivership Order transferred to a for-profit private housing developer the CHA's obligations to build public housing in the General Area in accordance with the specific dictates of the Injunction regarding, inter alia, location, size, density, and in accordance with all of HUD's application rules and regulations. Given the control over the location and building of public housing exercised by the Injunction and HUD, the acts necessary to build the housing are administrative and ministerial. Once the location and design of a public building is determined, questions regarding how the building is to be built becomes the responsibility of the developer. The receiver is free to choose where in the General Area public housing will be built, within specific parameters set by the Injunction, but beyond that the receiver is a private developer building public housing.

The CHA's role under HOPE VI is quintessentially governmental: resource allocation; balancing totality of obligations in all parts of its system; negotiation with citizens and other governmental entities; economic development; negotiating with private developers to create mixed-income housing; deciding how to spend 20% of the total funds on social services in the community; considering alternative financing methods; and, inevitably, defending its actions in court. HOPE VI makes the local housing authority responsible and accountable for the success of the revitalization project. All decisions (which neighborhood will be the subject of a HOPE VI revitalization plan, which buildings will be demolished, how much replacement housing will be built on-site, what of CHA's total resources should be diverted to the plan, how much funding to seek, and multiple other issues) must be made by the local housing authority.

3. Federal Law Requires CHA To Negotiate With Residents

The plan, however, must be developed with the tenants' meaningful participation and negotiated with and agreed to by the City. CHA is required, under federal law, to negotiate with the residents regarding the revitalization plan. (See Section II.B.5., above) If the receiver has responsibility for replacements units, and the receiver has sole authority to negotiate with the resident regarding replacement units, CHA's compliance with federal law will be undertaken by a private developer. The receiver was not appointed to assume CHA's responsibilities under federal laws that govern CHA.

4. Receivership Order In Ambiguous When Applied to HOPE VI

Application of the Receivership Order to HOPE VI creates ambiguity, and is in many ways nonsensical, ambiguous, or inapplicable. For example, the receiver has "all powers" of CHA regarding housing development, but under HOPE VI, CHA does not have any power or authority to develop public housing. HOPE VI requires that the developer be selected based on a competitive RFP process. (See, e.g., R.Exh.B.8, 63 Federal Register 15577, 15584 (E)(4); R.Exh.C, 24 CFR § 941.102)[9] Since the receiver cannot step into CHA's shoes and be the developer of HOPE VI replacement housing, there is no reason to empower the receiver to select the location of that housing.

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[9] "R.Exh.__.__" refers to the exhibits attached to this reply brief.

The court did not consider whether the receiver's specific duties under the Receivership Order are compatible with at HOPE VI program, yet those duties, designed to building public housing, are now being applied to HOPE VI projects. For example, CHA is required to "cooperate" with the receiver and provide all necessary information. That is easy to do when the Receiver has all of CHA's authority to build public housing. It is not clear what the duty of cooperation requires when the responsibility is shared.

B. The May Order Is Not "Modest."

The receiver asserts that the May 19 Order is "modest" in that it only directs CHA to "coordinate" and "cooperate"with the receiver on the preparation of the 1998 HOPE VI application. (Rec. Br. at 29). Given the multitude of meanings that "coordinate" and "cooperate" might have when applied to a HOPE VI program, the Order is far from modest. It is also vague and unenforceable. However, the May Order does much more: it construes the Receivership Order to transfer "'all powers of CHA respecting' HOPE VI housing development" to the receiver.[10] (Rec. Brief at 33)

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[10] The Receiver also refers to the District Court's May 21 and May 22 Orders to demonstrate the limits of the District Court's May Order. (Rec. Brief at 31-33, 39-40) In those orders, the District Court waivers between declarations that the Receivership Order gave "all powers of the CHA" with regard to HOPE VI housing development to the receiver and declarations that the Receiver does not have "all powers" with regard to tasks such as applying for HOPE VI funds. Yet the Receivership Order explicitly gives the receiver exclusive authority to apply for housing development funds. Somehow CHA is supposed to figure it out. The May 21 and May 22 Orders are so vague as to be unenforceable. Also compare Rec. Brief at 31 ("The May 19 Order did not . . . 'transfer[] the CHA's authority over HOPE VI-funded housing development to the receiver.") with Rec. Brief at 33 ("[The Receivership Order] gave the Receiver 'all powers of CHA respecting' HOPE VI housing development . . ..").

This is not a modest order. The receiver argues that its responsibilities under the Receivership Order include "remedying prior discrimination." (Rec. Brief at 37) Even on activities the receiver agrees are outside of the scope of the Receivership Order, such as rehabilitation or social programs, the receiver asserts that the CHA may operate such programs "assuming they are operated so as not to frustrate the receiver's efforts or the Injunction." (Rec. Br. at n.20) There is no question that the receiver considers itself to be the monitor of CHA activities to determine whether its programs "frustrate the receiver's efforts or the Injunction." The receiver is not talking about making sure the locational requirements are met, but rather whether the HOPE VI plan fulfills CHA's duty to administer its system to disestablish segregation–to make sure that CHA meets the receiver's notion of whether CHA is fulfilling that vague and unenforceable duty.

C. This Court Should Take Judicial Notice That CHA Is No Longer a "Troubled Housing Authority"

CHA has been on HUD's "troubled housing authority" list since the list was first created nearly 20 years ago.[11] (See, e.g., R.Exh.D.1) CHA is no longer considered a troubled housing authority. (Id.) The changes at CHA over the past three years are astounding. Yet the district court has decided, at this juncture, to transfer the CHA's "powers" with regard to HOPE VI to a private real estate developer on the basis of one phrase from a thirty-

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[11] CHA respectfully requests that this Court take judicial notice of the public record of the troubled housing authority list. See United States v. Marren, 890 F.2d 924, 934 (7th Cir. 1989) (judicial notice taken by appellate court during appellate proceedings). CHA was taken off of the list after the record on appeal was supplemented.

year old injunction and one phrase from a ten-year old order appointing that developer as a receiver to build individual units of public housing.

D. May Order Violates Principle of Federalism.

The Order violates the principle of federalism, even assuming arguendo that the court's interpretations of the Injunction and Receivership Order are correct and even assuming arguendo that the Injunction and HOPE VI are compatible. There was no claim or finding below that there is any substantive problem with the CHA's HOPE VI program. In ACORN, 56 F.3d at 798, this Court struck a remedy imposed against a state agency that had been found liable for violating a federal statute. The injunction in ACORN required the agency to comply with the law (including the appointment of an "election czar"), but further delegated the czar "all necessary powers to ensure compliance with the law." Id. The federal statute at issue made no such requirement. In striking the decree on the ground that it "failed to exhibit an adequate sensitivity to the principles of federalism," this Court wrote that "until it appears that the state will not comply with such an injunction, there is no occasion for the entry of a complicated decree that treats the state as an outlaw and requires it to do even more than the 'motor voter' law requires." Id. While CHA was found liable nearly thirty years ago for violating the Constitution, it has not been found liable for violating HOPE VI or the underlying Injunction. Yet, the court has interpreted a 1987 Order in such a manner as to impose a exactly the same monitor on CHA as that imposed in ACORN.

E. The Receiver Is Not a Party and Is Not Entitled to Litigate the Scope of the Court's Prior Orders

This Court has stated that a court-appointed receiver:

> may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties [or] . . . which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him.

Holland v. Sterling Enterprises, Inc., 777 F.2d 1288, 1291-92 (7th Cir. 1985) (vacating district court's order allowing receiver to "intervene" in lawsuit). The receiver's active participation in these proceedings on its own behalf and as an adversary of CHA is improper and in the nature of an ex parte communication. Cf. K.L., et al. v. Edgar, et al., 93 F.3d 256, 261-62 (7th Cir. 1996).

F. Receiver's Allegations of Contempt Are Improper And Disputed.

The receiver suggests that it is undisputed (or that the district court found) that CHA's recent conduct amounts to contempt of court orders with regard to HOPE VI and the Receivership Order, that the CHA has acted to avoid the "court imposed remedy," that the CHA intends to "frustrate the desegregation provision of the 1969 Injunction . . .," or that the CHA "is unwilling to comply with the Gautreaux decree." (Rec. Br. at 29, 30, 37) Referring to such accusations as "fact" in a brief filed with this Court is irresponsible, destructive, unfair, and prejudicial. Such accusations have been vigorously disputed, both in filings with the district court and correspondence that is not part of the record. The receiver now claims that its allegations of contemptuous behavior were rendered "undisputed" by virtue of the fact that the CHA did not file responsive affidavits to the receiver's affidavits containing such allegations. (Rec. Br. at 41). CHA demanded the opportunity to rebut the affidavits at a hearing on the factual issues raised in the receiver's affidavits.[12] The CHA continues to demand such a hearing in the court each and every time that appellees revive the accusations repeated here. As a result, all of the "facts" supported by citations to affidavits are disputed, and should not be considered in connection with this appeal.

Respectfully submitted,

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12 The district court has made statements critical of CHA. (Rec. Brief at 19-20) The court's perceptions are based on its view that the Injunction and the Receivership Order are clear on their face and apply to HOPE VI. The CHA is entitled to litigate the issues, as the May Order, as opposed to the court's comments prior to issuing the order, demonstrates.

24 CFR 941.202 printed in FULL format.

*** THIS SECTION IS CURRENT THROUGH THE 7/28/98 ISSUE OF ***
*** THE FEDERAL REGISTER **

TITLE 24 -- HOUSING AND URBAN DEVELOPMENT
SUBTITLE B -- REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT
CHAPTER IX -- OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING,
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PART 941 -- PUBLIC HOUSING DEVELOPMENT
SUBPART B -- PHA ELIGIBILITY AND PROGRAM REQUIREMENTS

24 CFR 941.202

§ 941.202 Site and neighborhood standards.

Proposed sites for public housing projects to be newly constructed or rehabilitated must be approved by the field office as meeting the following standards:

(a) The site must be adequate in size, exposure and contour to accommodate the number and type of units proposed, and adequate utilities (e.g., water, sewer, gas and electricity) and streets must be available to service the site.

(b) The site and neighborhood must be suitable from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, E.O. 11063, and HUD regulations issued pursuant thereto.

(c)(1) The site for new construction projects must not be located in:

(i) An area of minority concentration unless (A) sufficient, comparable opportunities exist for housing for minority families, in the income range to be served by the proposed project, outside areas of minority concentration, or (B) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area. An "overriding need" may not serve as the basis for determining that a site is acceptable if the only reason the need cannot otherwise feasibly be met is that discrimination on the basis of race, color, religion, creed, sex, or national origin renders sites outside areas of minority concentration unavailable; or

(ii) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

(2) Notwithstanding any other provision of this paragraph (c), public housing units constructed after demolition of public housing units may be built on the original public housing site, or in the same neighborhood, if one of the following criteria is satisfied:

(i) The number of public housing units being constructed is no more than 50 percent of the number of units in the original project;

(ii) In the case of replacement of a currently occupied project, the number of public housing units being constructed is the minimum number needed to house current residents who want to remain at the site; or

(iii) The public housing units being constructed constitute no more than twenty-five units.

(3) [Removed. See 61 FR 38014, 38017, July 22, 1996.]

(d) The site must promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(e) The site must be free from adverse environmental conditions, natural or manmade, such as instability, flooding, septic tank back-ups, sewage hazards or mudslides; harmful air pollution, smoke or dust; excessive noise vibration, vehicular traffic, rodent or vermin infestation; or fire hazards. The neighborhood must not be one which is seriously detrimental to family life or in which substandard dwellings or other undesirable elements predominate, unless there is actively in progress a concerted program to remedy the undesirable conditions.

(f) The site must comply with any applicable conditions in the local plan approved by HUD.

(g) The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.

(h) Travel time and cost via public transportation or private automobile, from the neighborhood to places of employment providing a range of jobs for low-income workers, must not be excessive. (While it is important that elderly housing not be totally isolated from employment opportunities, this requirement need not be adhered to rigidly for such projects.)

(i) The project may not be built on a site that has occupants unless the relocation requirements referred to in § 941.207 are met.

(j) The project may not be built in an area that has been identified by HUD as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the project is covered by flood insurance as required by the Flood Disaster Protection Act of 1973, and it meets any relevant HUD standards and local requirements.

HISTORY:
[45 FR 60838, Sept. 12, 1980. Redesignated at 49 FR 6714, Feb. 23, 1984, as amended at 58 FR 4270, Jan. 13, 1993, as corrected at 58 FR 61024, Nov. 19, 1993; 59 FR 10495, Mar. 25, 1994; 61 FR 19708, 19714, May 2, 1996; 61 FR 38014, 38017, July 22, 1996]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
42 U.S.C. 1437b, 1437c, 1437g, and 3535(d).
NOTES:
[EFFECTIVE DATE NOTE: 61 FR 38014, 38017, July 22, 1996, which amended this section, became effective Aug. 21, 1996.]
NOTES APPLICABLE TO ENTIRE TITLE:
CROSS REFERENCES: Farmers Home Administration, Department of Agriculture: For agricultural credit, see 7 CFR Chapter XVIII.
Office of Thrift Supervision, Department of the Treasury, 12 CFR Chapter V.
Department of Veterans Affairs regulations on assistance to certain veterans in acquiring specially adapted housing and guaranty of loans on homes: See Loan Guaranty, 38 CFR Part 36.

729 words

R. EXH. A.3

Funding Availability for Revitalization of Severely Distressed Public Housing (Hope VI Revitalization)

Program Description: Approximately $441 million is available in funding for the Revitalization of Severely Distressed Public Housing (the "HOPE VI Revitalization Program"), as provided in the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998. The continued funding of the HOPE VI Program is to enable revitalization and transformation of the physical site of severely distressed public housing developments and the social dynamics of life for low-income residents at that site, or in any off-site replacement housing.

Application Due Date: Applications must be received at HUD Headquarters on or before 12:00 pm, Eastern time on June 29, 1998, at HUD Headquarters. See the General Section of this SuperNOFA for specific procedures governing the form of application of submission (e.g., mailed applications, express mail, overnight delivery, or hand carried).

Addresses for Submitting Applications: One copy of the completed application must be received at HUD Headquarters, 451 Seventh Street, SW, Room 4138, Washington, DC 20410, Attention: Deputy Assistant Secretary for Public Housing Investments. In addition, two copies of the completed application also must be received at the appropriate HUD Field Office HUB.

For Application Kits, Further Information, Technical Assistance:

For Application Kits. A copy of the application kit will be mailed to every eligible PHA. Application kits and any supplementary information also may be obtained by contacting the SuperNOFA Information Center at 1-800-HUD-8929. Persons with hearing or speech impairments may call the Center's TTY number at 1-800-483-2209. The application kit also will be available on the Internet through the HUD web site at http://www.HUD.gov. When requesting an application kit, please refer to HOPE VI and provide your name, address (including zip code), and telephone number (including area code).

For Further Information and Technical Assistance. For answers to your questions, you may call Mr. Milan Ozdinec, Director, Office of Urban Revitalization, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4142, Washington, DC 20410; telephone (202) 401-8812 (this is not a toll free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 1-800-877-8399.

I. Additional Information

(A) Authority

The funding for HOPE VI Revitalization grants under this SuperNOFA is provided by the FY 1998 HUD Appropriations Act under the heading "Revitalization of Severely Distressed Public Housing (HOPE VI)."

(B) Purpose

The purpose of the HOPE VI Program is to enable revitalization and transformation of the physical site of severely distressed public housing developments and the social dynamics of life for low-income residents at that site, or in any off-site replacement housing. The HOPE VI Revitalization Program provides for grants to public housing agencies to assist in:

(1) The demolition of severely distressed public housing projects or portions of these projects;

(2) The revitalization (where appropriate) of sites (including remaining public housing units) on which such projects are located;

(3) The provision of replacement housing which will avoid or lessen concentration of very low-income families;

(4) Tenant-based assistance in accordance with section 8 of the U.S. Housing Act of 1937;

(5) Assisting tenants displaced by demolition.

The FY 1998 HOPE VI appropriation also provides for grant funds to be used for the demolition of severely distressed elderly public housing projects and the replacement, where appropriate, and revitalization of the elderly public housing as new communities for the elderly designed to meet the special needs and physical requirements of the elderly.

(C) Amount Allocated

(1) *Revitalization grants.* Approximately $416 million of the FY 1998 HOPE VI appropriation has been allocated to fund HOPE VI Revitalization grants.

(2) *Elderly Housing grants.* In accordance with the FY 1998 HUD Appropriations Act, $26 million of the HOPE VI appropriation has been allocated to fund projects proposing demolition of severely distressed elderly public housing projects and the replacement, where appropriate, and revitalization of the elderly public housing as new communities for the elderly designed to meet the special needs and physical requirements of the elderly.

(a) Targeted developments may be either:

(i) Housing designated for the elderly, persons with disabilities, or mixed-populations, in accordance with section 7 of the U.S. Housing Act of 1937; or

(ii) Projects of a PHA designated as elderly by HUD in accordance with requirements in effect prior to enactment of the Housing and Community Development Act of 1992.

(iii) A PHA may, after revitalization, designate the targeted development through a HUD-Approved allocation plan.

(b) Applications targeting elderly developments will be rated in a separate competition, and will be ranked only with other elderly applications.

(c) Of the $26 million made available for elderly housing, the FY 1998 HUD Appropriation Act included up to $10 million for Heritage House in Kansas City, Missouri. HUD awarded $6,570,500 to Heritage House under the FY 1997 HOPE VI NOFA, therefore the full $10 million will not be needed. After funding the needs of Heritage House, the balance of the $10 million set-aside will be made available for Elderly Housing grants eligible for funding under this SuperNOFA.

(3) *HOPE VI Demolition-Only Grants.* Up to $60 million in HOPE VI funds will be made available for the demolition of obsolete public housing without revitalization. Those funds will be distributed through a separate NOFA.

(4) *Section 8.* Up to $91 million (approximately 10,000 units) has been allocated for Section 8 tenant-based certificates and vouchers for public housing relocation or public housing replacement (including units selected for the HOPE VI Program). The Section 8 funds will be allocated by HUD after HUD approval of the applicant's demolition/disposition application or distressed public housing conversion plan submitted in lieu of a demolition/disposition application in conformance with the statutory requirements for the mandatory conversion of distressed public housing units as required by section 202 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. These section 8 funds will be distributed through a separate notice.

(D) Eligible Applicants

PHAs that own public housing units are eligible to apply. Indian Housing Authorities are not eligible to apply.

R. EXH. B.1

(E) Eligible Activities and Program Authority

Eligible activities are those eligible under sections 5 and 14 of the U.S. Housing Act of 1937 (42 U.S.C. 1437f, 1437l) (1937 Act). Revitalization activities using HOPE VI funds must be for public housing developments. Accordingly, certain activities under the revitalization plan are subject to statutory requirements applicable to public housing developments under the U.S. Housing Act of 1937 (the 1937 Act), other statutes, and the ACC. Within such restrictions, HUD seeks innovative solutions to the long-standing problems of severely distressed developments.

In order to satisfy any particular statutory requirement, a Grantee may take measures as described in implementing regulations, or upon request to HUD for a different approach, as otherwise approved in writing by HUD. As of the date of publication of this SuperNOFA, the provisions of section 14(q) of the U.S. Housing Act of 1937, as amended by section 201 of the FY 1996 HUD Appropriation Act, including provisions in sections 14(q)(2), (3), and (4) of the U.S. Housing Act of 1937 concerning mixed-income development, have not been extended to over FY 1998 HOPE VI or section 14 Modernization Funding.)

The recipient must conduct the following activities, which may be undertaken with HOPE VI grant funds, in accordance with the cited program requirements or otherwise with HUD's written approval, consistent with the 1998 Appropriations Act and this SuperNOFA. Activities which may be funded with HOPE VI grant funds include but are not limited to:

(1) Total or partial demolition of buildings, in accordance with 24 CFR part 970;

(2) Disposition of property, in accordance with 24 CFR part 970;

(3) Public housing development through the acquisition of land; or acquisition of off-site units with or without rehabilitation to be used as public housing, in accordance with 24 CFR part 941;

(4) Major rehabilitation and other physical improvements of housing and community facilities primarily intended to facilitate the delivery of self-sufficiency, economic development, or other supportive service opportunities for residents of the targeted development, in accordance with 24 CFR 968.112(b), (d), (e), and (g)–(o), 24 CFR 968.130, and 24 CFR 968.135(b) and (d);

(5) Construction of replacement rental housing, both on-site and off-site, and community facilities primarily intended to facilitate the delivery of self-sufficiency, economic development, or other supportive service opportunities for residents of the targeted development and off-site replacement housing, in accordance with 24 CFR part 941, including mixed-finance development in accordance with subpart F;

(6) Homeownership units will be deemed Replacement Units only as specified in the Urban Revitalization heading of the 1993 Appropriations Act (Pub.L. 102–389; approved October 6, 1992); that is, if they meet the statutory requirements of the Section 5(h) Program (42 U.S.C. 1437c(h)); the HOPE II program (42 U.S.C. 12871–80; Pub. L. 101–625, secs. 421–31; 104 Stat. 4079, 4162–72); the HOPE III program (42 U.S.C. 12891–98; Pub.L. 101–625, secs. 441–48; 104 Stat. 4079, 4172–80); or are made available through housing opportunity programs of construction or substantial rehabilitation of homes meeting essentially the same eligibility requirements as the Nehemiah Program.

(7) Management improvements;

(8) Administration, planning, and technical assistance;

(9) Programs designed to help residents gain employment and attain self-sufficiency;

(10) Programs designed to meet the special needs and physical requirements of the elderly and/or disabled and enable the elderly and/or disabled to live where one chooses with dignity, control, and independence.

(11) Relocation, conducted in accordance with 24 CFR 970.5 (demolition) or 24 CFR 968.108 (rehabilitation), as appropriate.

(F) Waivers

PHAs may request, for the revitalized development, a waiver of HUD regulations (that are not statutory requirements) governing rents, income eligibility, or other areas of public housing management to permit a PHA to undertake measures that enhance the long-term viability of a development revitalized under this program.

(G) Limitations on Use of Funds

No funds awarded for the HOPE VI Revitalization Program under this SuperNOFA shall be used for any purpose that is *not* provided for under the: FY 1998 HUD Appropriations Act; United States Housing Act of 1937; the Appropriations Acts for the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies, for the Fiscal Years 1993, 1994, 1995, and 1997; and the Omnibus Consolidated Rescissions and Appropriations Act of 1996. Additionally, no funds awarded for the HOPE VI Program under this SuperNOFA shall be used directly or indirectly by granting competitive advantage in awards to settle litigation or pay judgements.

II. Program Requirements

In addition to the program requirements listed in the General Section of this SuperNOFA, applicants are subject to the following requirements:

(A) Severely Distressed

In order to be eligible for HOPE VI funding, a public housing development, or portion of the development, must be severely distressed as to physical condition, location, or other factors, making the development, in its current condition, unusable for housing purposes. Major problems indicative of severe distress are:

(1) *Physical Condition:* structural deficiencies (e.g. settlement of earth below the building caused by inadequate structural fills, faulty structural design, or settlement of floors), substantial deterioration (e.g., severe termite damage or damage caused by extreme weather conditions), or other design or site problems (e.g., severe erosion or flooding).

(2) *Location:* physical deterioration of the neighborhood; change from residential to industrial or commercial development; or environmental conditions as determined by HUD environmental review, which was previously conducted in accordance with 24 CFR part 50, which jeopardize the suitability of the site or a portion of the site and its housing structures for residential use.

(3) Other factors which have seriously affected the marketability, usefulness, or management of the property, such as significant numbers of families living in poverty, significant incidence of serious crime, high vacancy rate, high turnover rate, low rent collections, etc.

(B) Grant Limitations

The following grant amount limits apply to HOPE VI grants under this SuperNOFA. The grant amount shall be limited by the total amount determined by addition of paragraphs (1), (2), (3), and (4) below, as applicable.

(1) *Total Development Cost (TDC).* TDC is limited to the sum of:

(a) TDCs up to, but not to exceed 100% of, HUD's published TDC limits for the costs of demolition and new construction multiplied by the number of public housing Replacement Units; and/or

R. EXH. B.2

(b) 90% of such TDC limits multiplied by the number of public housing units to be substantially rehabilitated.

Total Development Cost (TDC) is limited by the HUD-published TDC Cost Tables, which are issued for each fiscal year for the building type and bedroom distribution for the public housing replacement units. Duplicative funding is prohibited for any replacement units previously funded by HOPE VI or other HUD funds. This requirement does not prohibit any non-HUD funds to be used to supplement HUD funds for any project cost. Disclosure of all prior HUD grant assistance is required for the targeted development. The only exception to this rule is that the receipt of Section 8 relocation assistance does not affect the eligibility of the applicant to receive subsequent HOPE VI Revitalization funding for replacement of the same units.

The Department has developed a new TDC policy and cost control which applies to 1998 grants. A HUD Notice and rule describing this policy will be issued in the near future.

(2) *Community and Supportive Services Programs.* Applicants may request up to $5,000 per household for community and supportive services, including self-sufficiency programs, based on:

(a) The number of households in occupied units in the project to be revitalized at the time of application submission, and

(b) The estimated number of new households that are expected to occupy replacement units after revitalization; or

(3) *Services to Assist the Elderly.* Applicants may request up to $5,000 per household for human services programs to address quality of life and other social needs, as opposed to self-sufficiency programs of family HOPE VI projects, rewarding innovative objectives and programs, particularly as related to aging in place and assisted living.

(4) *Relocation.* Applicants may request no more than $3,000 per occupied unit at the time of HOPE VI application submission for relocation services and expenses.

(5) *Total Grant Amount.*

(a) Revitalization Applications.

(i) A PHA may submit one or two separate Revitalization applications. The *total* amount requested in one or both applications may not exceed $35 million. If a PHA submits two applications, each application will be reviewed separately, subject to the grant limitation amounts above, and if both applications are selected, the total amount the applicant may receive may not exceed $35 million.

(ii) Notwithstanding the fact that a PHA may submit one or two Revitalization applications, each individual application may include a request for funds for only one public housing development. Developments that are contiguous, immediately adjacent to one another, or within four city blocks from each other will be considered one development for the purposes of the HOPE VI Program under this SuperNOFA. There is no minimum or maximum number of housing units for which funds may be requested in a single application.

(b) Elderly Housing Grant Applications.

(i) A PHA may submit only one application under the Elderly Housing grant requesting no more than $5 million.

(ii) A PHA may not submit an application for an Elderly Housing grant that targets the same units targeted in a Revitalization application.

(iii) Each application will be evaluated independently and must be viable regardless of whether a PHA applies for funds under the Revitalization grant.

(C) Public Meeting

The application must include a certification that at least one public meeting was held to notify residents and community members of the proposed activities described in the application. The meeting must be held after the publication date of this SuperNOFA. Issues that must be covered in the public meeting include:

(a) The extent of proposed demolition;

(b) Relocation issues; and

(c) Other revitalization activities.

(D) Replacement Units

(1) Rental units will be deemed Replacement Units and qualify for operating subsidy only if they are to be placed under Annual Contributions Contract and operated as Public Housing.

(2) Homeownership units will be deemed Replacement Units only as specified in the Urban Revitalization heading of the 1993 Appropriations Act (Pub. L. 102–389; approved October 6, 1992); that is, if they meet the statutory requirements of the Section 5(h) program (42 U.S.C. 1437c(h)); the HOPE II program (42 U.S.C. 12871–80; Pub. L. 101–625, secs. 421–31; 104 Stat. 4079, 4162–72); the HOPE III program (42 U.S.C. 12891–98; Pub.L. 101–625, secs. 441–48; 104 Stat. 4079, 4172–80); or are made available through housing opportunity programs of construction or substantial rehabilitation of homes meeting essentially the same eligibility requirements as the Nehemiah program.

(3) HOPE VI funds may not directly support mixed-finance units which are not themselves to be placed under ACC or be sold as homeownership units as specified above.

(E) Section 3 Economic Opportunities

Please see Section II(E) of the General Section of this SuperNOFA. The requirements of Section 3 are applicable to HOPE VI.

(F) Flood Insurance

In accordance with the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001–4128), HUD will not approve applications for grants providing financial assistance for acquisition or construction (including rehabilitation) of properties located in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(1) The community in which the area is situated is participating in the National Flood Insurance program (see 44 CFR parts 59 through 79), or less than one year has passed since FEMA notification regarding such hazards; and

(2) Where the community is participating in the National Flood Insurance Program, flood insurance is obtained as a condition of approval of the application.

(G) Coastal Barrier Resources Act

In accordance with the Coastal Barrier Resources Act (16 U.S.C. 3501), HUD will not approve grant applications for properties in the Coastal Barrier Resources System.

(H) OMB Circulars

Please see Section II(H) of the General Section of this SuperNOFA.

(I) Conflict of Interest

(1) In addition to the conflict of interest requirements in 24 CFR part 85, no person who is an employee, agent, consultant, officer, or elected or appointed official and who exercises or has exercised any functions or responsibilities with respect to activities assisted by HOPE VI funds, or who is in a position to participate in a decisionmaking process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds thereunder, either for himself or herself or for those with whom her or she has family or business ties, during his or her tenure or for one year thereafter.

(2) HUD may grant an exception to the exclusion in paragraph (1) of this section on a case-by-case basis when it determines that such an exception will serve to further the proposes of the program and the effective and efficient administration of the revitalization activities. HUD will consider an exception only after the applicant or recipient has provided a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict and a description of how the public disclosure was made, and an opinion of the applicant's or recipient's attorney that the interest for which the exception is sought would not violate State or local laws. In determining whether to grant a requested exception, HUD will consider the cumulative effect of the following factors, as applicable:

(a) Whether the exception would provide a significant cost benefit or an essential degree of expertise to the revitalization program that would otherwise not be available;

(b) Whether an opportunity was provided for open competitive bidding or negotiation;

(c) Whether the person affected is a member of a group or class intended to be the beneficiaries of the activity, and the exception will permit such person to receive generally the same interest or benefits as are being made available or provided to the group or class;

(d) Whether the affected person has withdrawn from his or her functions or responsibilities, or the decisionmaking process, with respect to the specific activity in question;

(e) Whether the interest or benefit was present before the affected person was in a position as described in paragraph (1) of this section;

(f) Whether undue hardship will result either to the applicant, recipient, or the person affected when weighted against the public interest served by avoiding the prohibited conflict; and

(g) Any other relevant considerations.

(J) Labor Standards

Where HOPE VI funds provide assistance with respect to low-income housing that will be subject to a contract for assistance under the U.S. Housing Act of 1937, Davis-Bacon or HUD-determined wage rates apply to development or operation of the housing to the extent required under section 12 of the Act. Under section 12, the wage rate requirements do not apply to individuals who: perform services for which they volunteered; do not receive compensation for those services or are paid expenses, reasonable benefits, or a nominal fee for the services; and are not otherwise employed in the work involved (24 CFR part 70). In addition, if other Federal programs are used in connection with the revitalization program, labor standards requirements apply to the extent required by such other Federal programs, on portions of the development that are not subject to Davis-Bacon rates under the Act.

(K) Lead-Based Paint Testing and Abatement

Any property assisted under the HOPE VI Program is covered by the Lead-Based Paint Poisoning Prevention Act (24 U.S.C. 4821 *et seq.*) and is therefore subject to 24 CFR part 35; 24 CFR part 965, subpart H; and 24 CFR 968.110(k).

(L) Building Standards

All activities that include construction, rehabilitation, lead-based paint removal, and related activities:

(1) Must meet or exceed local building codes; and

(2) Must comply with the 1992 Model Energy Code issued by the Council of American Building Officials.

(M) Program Income

Where a plan contemplates the receipt of program-related income prior to grant closeout (e.g., from sale of homeownership Replacement Units, or the disposition of improved land), such income must be reflected in the HOPE VI budget and used for program purposes.

III. Application Selection Process

(A) Threshold Criteria for Funding Consideration

(1) The applicant must be an eligible Public Housing Agency.

(2) The targeted public housing development or portion thereof must be severely distressed, as defined in Section II(A) of this HOPE VI Program section of the SuperNOFA.

(3) The application must include all required forms, certifications and assurances, properly signed and executed, after any period provided for the curing of deficiencies consistent with section V below.

(4) Applications that propose new construction of replacement housing must comply with the requirements of section 6(h) of the 1937 Act by submitting the information described in either paragraphs (a) or (b) of this section:

(a) A PHA comparison of the costs of new construction (in the neighborhood where the PHA proposes to construct the housing) and the costs of acquisition of existing housing or acquisition and rehabilitation in the same neighborhood (including estimated costs of lead-based paint testing and abatement), or

(b) A PHA certification, accompanied by supporting documentation, that there is insufficient existing housing in the neighborhood to develop housing through acquisition of existing housing or acquisition and rehabilitation.

(B) Application Rating Factors

The factors for rating and ranking applications and the maximum points for each factor, are provided below. The maximum number of points for each application is 102. This includes two EZ/EC bonus points, as described in the General Section of this SuperNOFA.

Rating Factor 1: Capacity of the Applicant and Relevant Organizational Experience (20 Points)

This factor addresses the extent to which the applicant has the organizational resources necessary to successfully implement the proposed activities in a timely manner. In order to ensure that revitalization efforts take place without delays attributable to administration and management, applications that demonstrate the highest degree of capability to implement revitalization in an expeditious manner upon grant award will be awarded the most points under this rating factor.

The rating of the "applicant" or the "applicant's organization and staff," unless otherwise specified, will include any sub-contractors, consultants, subrecipients, and members of consortia which are firmly committed to the project.

In rating this factor, HUD will consider the extent to which:

(1) The applicant and/or its proposed partners, including the overall proposed project director and staff, the day-to-day program manager, consultants, and contractors, have knowledge and recent, successful experience in planning, implementing, adapting, and managing:

(a) Revitalization activities;

(b) Self-sufficiency programs;

(c) Supportive services for the elderly, if applicable;

(d) Other programs similar in scope or nature to the proposed activities.

HUD does not require that the applicant have its program manager and/or developer selected prior to submission of the application, although the PHA may elect to do so. Rather, the PHA must demonstrate its capacity or its ability to identify needs in its current staffing to successfully implement its program, and/or describe in detail its proposed method for securing a program manager and/or development partner to implement the plan.

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(2) The applicant has adequate experience in management and marketing. The applicant has thoroughly evaluated the obstacles that prevented good management, as well as other problems that contributed to the obsolescence of the targeted development, and the new management plan will protect against such obstacles and problems and will improve the efficiency and economy of management. PHAs may propose private management or self-management, but in the latter case *must* demonstrate its capacity to self-manage; or

(3) The applicant has sufficient personnel or will be able to procure partners quickly to implement the revitalization plan in a timely and effective fashion immediately after grant award;

(4) The applicant proposes an appropriate balance of oversight and autonomy in its use of partners and/or contractors;

(5) The applicant has satisfactory managerial experience with resident initiatives;

(6) If the applicant received HOPE VI funding in previous years, HUD will evaluate its ability to demonstrate progress through its expenditure rate and achievement of program objectives.

Rating Factor 2: Need/Extent of the Problem (20 Points)

This factor addresses the extent to which there is a need for funding the proposed program activities to address a documented problem in the target area. In rating this factor, HUD will consider:

(1) The extent to which the applicant has documented a critical level of need for the proposed activities at the targeted development. Documentation of need must demonstrate that:

(a) There is a significant level of physical deterioration of buildings and sites, as supported by information and data which shows the extent of physical problems at the site such as major structural deficiencies, electrical systems under code, poor site conditions, leaking roofs, deteriorated infrastructure, high levels of deferred maintenance, number of units that do not meet Housing Quality Standards, levels of lead based paint, and other factors;

(i) The level of distress at the site is urgent and threatens to become imminently greater without immediate intervention;

(ii) The PHA lacks the funds to revitalize the development to provide decent, safe, and sanitary housing at the site;

(b) The level of physical distress in the surrounding community is extreme and contributes to the obsolescence of the site, as evidenced by information and data addressing such factors as housing density, housing deterioration, and lack of adequate infrastructure or utilities;

(c) The community as a whole has a demonstrated level of social distress, as evidenced by indicators such as significant incidence of criminal activity, a high vacancy rate, high rates of housing turnover, truancy, and unemployment, low rates of rent collections, graduation, and other objective, measurable indicators;

(d) The distress at the site was caused or exacerbated by obsolescence, not factors within the applicant's control;

(2) The extent to which the level of need for the proposed activity and the urgency in meeting the need are documented with statistics and analyses contained in a data source(s) that is sound and reliable. To the extent that the applicant's community's Consolidated Plan and Analysis of Impediments to Fair Housing Choice (AI) identifies the level of the problem and the urgency in meeting the need, references to these documents should be included in the response. The Department will review more favorably those applicants who used these documents to identify need, when applicable.

If the proposed activity is not covered under the scope of the Consolidated Plan and Analysis of Impediments to Fair Housing Choice (AI), applicants should indicate such, and use other sound data sources to identify the level of need and the urgency in meeting the need. Types of other sources include, but are not limited to, Census reports, Continuum of Care gaps analysis, law enforcement agency crime reports, Public Housing Authorities' Five Year Comprehensive Plan, and other sound and reliable sources appropriate for the specific SuperNOFA program and activities for which an applicant is applying. For technical assistance programs, input from HUD State and Area Office(s) and assessments are included among the data sources that may be used to identify need.

(3) The PHA agrees that they are subject to the provisions found at 24 CFR part 971 and that they are required to submit a conversion plan, i.e., a plan for removal of the distressed development from the public housing inventory, in accordance with the requirements at 24 CFR 971.7(b).

Rating Factor 3: Soundness of Approach (40 Points)

This factor addresses the quality and cost-effectiveness of the applicant's proposed revitalization plan. There must be a clear relationship between the proposed activities, community needs and the purpose of the program funding for an applicant to receive points for this factor. In rating this factor, HUD will consider the extent to which:

(25 Points for Subfactors (1) through (7))

(1) There is a demonstrated considerable market for the revitalized and/or replacement units of the type and size proposed;

(2) The purposes and goals of the program for which funding is requested will be achieved within an appropriate and reasonable timeframe and program activities will result in measurable accomplishments consistent with the purposes of the program.

(3) The cost estimates of program activities:

(a) Are financially sustainable over the long run;

(b) Are developed through the use of technically competent methodologies

(c) Represent a cost-effective plan for designing, organizing and carrying out the proposed activities;

(d) Are reasonable for the work to be performed and consistent with rates established for the level of expertise required to perform the work in the proposed geographic area;

(e) Are projected to be within HUD TDC and Community and Supportive Service limits;

(f) Are reasonable relative to the cost of providing section 8 tenant-based assistance.

(4) The information and strategies described are coherent and internally consistent.

(5) The proposal will lessen concentration of low-income residents and create desegregation opportunities:

(a) The physical design of the proposed housing will significantly reduce the isolation of low-income residents and/or significantly promote mixed-income communities in well-functioning neighborhoods;

(b) Access to municipal services, job information, mentoring opportunities, transportation, and educational facilities will be increased;

(c) Operational and management principles will promote economic and social diversity;

(d) Intensive counseling will be provided to section 8 certificate or voucher holders to find housing in non-poor areas and prepare these residents for self-sufficiency;

(6) The revitalization plan proposes innovative approaches to public housing transformation.

(a) Applicants are encouraged to design forward-thinking programs that incorporate the most current sound research on planning, implementation, financing, partnerships, management, and operation of public housing and self-sufficiency and educational programs. Conventional approaches should be reserved for HUD's formula-based capital programs.

(b) Applications should have the potential to yield innovative strategies or "best practices" that can be replicated and disseminated to other organizations, including nonprofit organizations, State and local governments. HUD will assess the transferability of results in terms of model programs or lessons learned from the work performed under the award. Applicants will be required to prepare an analysis of best practices as part of their reports to HUD that may be used by HUD to inform others who may be interested in learning from the experiences gained from the work performed under awards funded through this SuperNOFA.

(7) The design of the revitalized development demonstrates an achievable effort to blend into and enrich the urban landscape:

(10 Points for Subfactors (8) through (11))

(8) Applications for Elderly Housing grants:

(a) Will create new communities for the elderly and disabled designed to meet the special needs and physical requirements of the elderly and disabled. Applicants' elderly program strategies complement their overall HOPE VI revitalization strategy.

(b) Address the issues of transportation, access to health care, security, and affordability with innovative approaches.

(c) Propose demonstration programs based on recent research and program innovations. Applicants are free, however, to propose programs that address elderly and disabled needs in the manner most appropriate for their locality.

(d) Include provisions for sustainability beyond the proposed program period.

~~(10 points for Subfactors (9) through (11))~~

(9) Applications targeted toward families propose opportunities for self-sufficiency, particularly for persons enrolled in welfare-to-work programs. The self-sufficiency plan:

(a) Demonstrates objectives that are results-oriented, with measurable goals and outcomes;

(b) Demonstrates consistency with state and local welfare reform goals;

(c) Is financially and programmatically sustainable over the long run;

(d) Is well integrated with the development process;

(e) Proposes a program that is of an appropriate scale, type, and variety of services to meet the needs of residents;

(f) Proposes resident training, self-motivation, employment, and education;

(g) Includes opportunities for economic and retail development at or near the public housing site, as appropriate.

(h) Provides commitments by service providers to provide services and/or funding;

(i) Demonstrates that relationships have been forged with local Boards of Education, institutions of higher learning, non-profit or for-profit educational institutions and public/private mentoring programs that will lead to new or improved educational facilities and improved educational achievement of children of PHA residents from birth through higher education;

(j) Identifies employers and potential employment opportunities for residents who complete community and supportive service training; and

(k) Demonstrates an effective use of technology.

(10) Residents and members of the communities to be affected by the proposed activities have had and will continue to have full and meaningful involvement in the planning and implementation of the revitalization effort:

(a) In addition to meeting the requirement for at least one public meeting to inform residents and members of the surrounding community of the revitalization plan as presented in the application submitted to HUD, the PHA has provided meaningful opportunities for participation to residents and members of the surrounding community of the meeting(s) through:

(i) Clear information about the application;

(ii) Prominent posting of information about the application and scheduled meetings in locations likely to attract notice; and

(iii) Posting of the information in adequate time to allow participants to plan to attend meetings.

(b) Residents and non-resident members of the surrounding community:

(i) Have had the opportunity to participate in the shaping of the application;

(ii) Support the activities proposed in the submitted application;

(iii) Will have opportunities for continued involvement and participation as program activities proceed.

(11) The proposed operation and management principles will accomplish all of the following goals:

(a) Achieve efficient and effective property management and maintenance through private or PHA management;

(b) Lead to a range of incomes in the targeted development including substantial numbers of working residents through effective self-sufficiency programs;

(c) Reward work and promote family stability through positive incentives such as income disregards and ceiling rents. PHAs may establish ceiling rents and may institute earned income disregards for FY 1998;

(d) Provide greater safety and security by:

(i) Instituting tough screening requirements;

(ii) Enforcing tough lease and eviction provisions;

(iii) Enhancing on-going efforts to eliminate drugs and crime from neighborhoods through collaborative efforts with local law enforcement agencies and local United States Attorneys and program policy efforts such as "One Strike and You're Out," the "Officer Next Door" initiative, or Department of Justice "Weed and Seed" programs;

(iv) Promoting healthy homes, i.e., improving the safety and security of residents through anti-crime measures and the installation of physical security or design enhancements.

(e) Promote economic and demographic diversity through a system of local preferences; and

(f) Encourage self-sufficiency by including lease requirements that promote resident involvement in the tenants association, community service, self-sufficiency, and transition from public housing.

(12) (5 Points) The Revitalization Plan will affirmatively further fair housing by actively ensuring that marketing, locations of housing, and structural accessibility of housing will encourage natural integration and discourage inappropriate concentrations of minorities in undesirable neighborhoods.

(a) Developments constructed or rehabilitated with HOPE VI funds must meet the accessibility requirements contained in various civil rights statutes

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and regulations, and may receive points under this factor if they meet the visitability standards adopted by the Department that apply to those units not otherwise covered by the accessibility requirements.

(b) PHAs are encouraged to promote greater opportunities for housing choice by making at least 5% of for-sale units accessible to individuals with mobility disabilities and 2% of for-sale units accessible to individuals who have visual or hearing disabilities.

(c) Innovative designs are encouraged, particularly with respect to for-sale house configurations, which simultaneously meet accessibility requirements and achieve marketability for non-disabled households.

(d) Program activities should aid a broad diversity of eligible residents, including those that have been traditionally underserved. Efforts to increase community awareness in a culturally sensitive manner through education and outreach will also be evaluated, if applicable.

Rating Factor 4: Leveraging Resources (10 Points)

This factor addresses the ability of the applicant to secure additional resources for the proposed activities which can be combined with HUD's program resources to achieve program purposes. Resources include in-kind contributions such as staff or supplies; grants, loans, and other financing; or other types of contributions to the program activities. This factor emphasizes the importance of a PHA not just seeking endorsements and vendor relationships with others, but actively enlisting other stakeholders who are vested in the revitalization effort, including public and private non-profit and for-profit entities with experience in the development and/or management of low- and moderate-income housing, those that are skilled in the delivery of services to residents of public housing, educational institutions, foundations, banks, and other organizations. HUD will evaluate the strength of commitment articulated in letters of support.

If a PHA is also a redevelopment agency or otherwise has citywide responsibilities, HUD will consider the city's redevelopment or other functional area to be a separate partner with which the housing authority function is partnering, where appropriate.

In rating this factor, HUD will consider the extent to which:

(1) The PHA has initiated strong partnerships with entities that will provide significant, *firm* funding and other commitments if HOPE VI funds are awarded. Applicants must provide evidence of leveraging and partnerships by including in the application letters of firm commitments, memoranda of understanding, agreements to participate, or letters of support if firm commitments cannot be secured. All such documentation must include the organization's name, proposed level of commitment, and proposed responsibilities as they relate to the revitalization plan. The commitment must be signed by an official of the organization legally authorized to make commitments on behalf of the organization.

(2) The infusion of HOPE VI dollars will leverage additional resources after grant award, including municipal funds, charitable contributions, private debt and equity, and other partnerships which may not have a dollar value but are critical to the successful transformation of the development and the lives of its residents.

Rating Factor 5: Comprehensiveness and Coordination (10 Points)

This factor addresses the extent to which the applicant coordinated its activities with other known organizations, participates or promotes participation in a community's Consolidated Planning process, and is working towards addressing a need in a holistic and comprehensive manner through linkages with other activities in the community.

In rating this factor, HUD will consider the extent to which the applicant demonstrates that it has:

(1) Coordinated its proposed activities with those of other groups or organizations prior to submission in order to best complement, support and coordinate all known activities and if funded, the specific steps it will take to share information on solutions and outcomes with others. Any written agreements, memoranda of understanding in place, or that will be in place after award should be described;

(2) Taken or will take specific steps to become active in the community's Consolidated Planning process (including the Analysis of Impediments to Fair Housing Choice) established to identify and address a need/problem that is related to the activities the applicant proposes.

(3) Taken or will take specific steps to develop linkages to coordinate comprehensive solutions through meetings, information networks, planning processes or other mechanisms with:

(i) Other HUD-funded projects/activities outside the scope of those covered by the Consolidated Plan;

(ii) Civil rights organizations;

(iii) Local Area Agency on Aging, if applicable;

(iv) Local agency serving persons with disabilities, if applicable;

(v) Local Weed and Seed task force, if the targeted development is located in a designated Weed and Seed area; and

(vi) Other Federal, State or locally funded activities, including those proposed or on-going in the community.

(vii) Local law enforcement agencies and the local United States Attorney.

(C) Application Evaluation.

Awards under this HOPE VI Program section of the SuperNOFA will be made through a selection process that will award grants to the most meritorious applications.

(1) *Revitalization Applications.*

(a) HUD will preliminarily review, rate and rank each eligible application on the basis of the evaluation factors set forth in Section III(B) of this HOPE VI Program section of the SuperNOFA, above, excluding Factor 3(8), which is specific to applications proposing revitalization of elderly housing.

(b) A final review panel will assess each of the applications advanced to final review and will assign the final scores. The final review panel will review the scores of all applications:

(i) Whose preliminary score is above a base score established by HUD. HUD intends to set the base scores so that applications requesting a total of approximately $900 million are advanced to the final review stage.

(ii) That proposed revitalization activities at sites for which HOPE VI revitalization implementation applications were submitted to HUD in the FY 1997 HOPE VI revitalization competition but were not selected for funding.

(c) HUD will select for funding the most highly-rated eligible applications up to available funding, except that HUD, in its discretion, may choose to select a lower-rated approvable application over a higher-rated application in order to increase the level of national geographic diversity of applications selected under this HOPE VI Program section of the SuperNOFA.

(2) *Elderly Housing Grant Applications.*

(a) HUD will preliminarily review, rate and rank each eligible application on the basis of the evaluation factors set forth in Section III(B), above, excluding Factor 3(9), which is specific to applications proposing revitalization of family housing.

(b) A final review panel will assess each application and will assign the final scores;

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(c) HUD will select for funding the most highly-rated eligible applications up to available funding.

D) Notification of Funding Decisions.

(1) In accordance with the HUD Reform Act, HUD may not notify applicants as to whether or not they have been selected to participate until the announcement of the selection of all recipients for this HOPE VI Program under this SuperNOFA. HUD will provide written notification to all applicants.

(2) HUD's notification of award to a selected applicant will constitute a preliminary approval by HUD subject to:

(a) The completion of a subsidy layering review pursuant to 24 CFR 941.10(b);

(b) The execution by HUD and the recipient of a Grant Agreement; and

(c) A HUD environmental review. Selection for participation (preliminary approval) does not constitute approval of the proposed site. Each preliminarily-selected PHA must assist HUD in complying with environmental review procedures, conducted by HUD in accordance with 24 CFR part 50. The PHA may not acquire, rehabilitate, convert, lease, repair, or construct a property, or commit HUD or local funds to these activities, until written pproval is received from the appropriate HUD Environmental Clearance Officer in its area, certifying that the proposed activities have been approved and the PHA is released from all environmental conditions. The results of the environmental review may require that proposed activities be modified or the proposed site rejected.

(E) Grant Agreement.

Because the HOPE VI Program does not have Federal regulations, upon selection for funding, HUD and the recipient will execute a Grant Agreement setting forth the amount of the grant and applicable rules, terms, and conditions, including sanctions for violation of the agreement. The Grant Agreement will set forth the precise schedules of the HOPE VI Program, provide program requirements, describe requirements for implementation of the revitalization plan, and provide any special conditions on the Grantee, as applicable. Among other things, the Grant Agreement will provide that the recipient agrees to:

(1) Carry out the program in accordance with the provisions of this NOFA, applicable law, the approved application, and all other applicable requirements, including requirements for mixed finance development, and section 202 of OCRA;

(2) Comply with such other terms and conditions, including recordkeeping and reports, as HUD may establish for the purposes of administering, monitoring, and evaluating the program in an effective and efficient manner, including full cooperation with HUD's program oversight contractor;

(3) Assemble a team to implement the HOPE VI Program that has a strong management and development track record and has the capability to commence and carry out a quality HOPE VI program. If the Grantee fails to make this demonstration to the satisfaction of HUD and its program oversight manager, HUD will direct corrective actions as a condition of retaining the grant;

(4) Execute a construction contract within 18 months (or a period specified in the Grant Agreement). Failure to obligate funds will result in the enforcement of default remedies up to and including withdrawal of funding; and

(5) Establish interim performance goals and complete the physical component of the HOPE VI revitalization within 48 months of execution of the grant agreement. The Secretary shall enforce this requirement through default remedies up to and including withdrawal of funding that the PHA has not obligated. HUD will take into consideration those delays caused by factors beyond the control of the Grantee when enforcing these schedules; and

(6) Execute an ACC Amendment for Mixed-Finance development.

(F) Failure to Proceed

In the event that an applicant selected to receive HOPE VI funding does not proceed in a manner consistent with its application, HUD may withdraw any unobligated balances of funding and make this funding available, subject to applicable law, in HUD's discretion, to the next highest ranked applicant that was not selected for funding in the most recently conducted HOPE VI selection process or combined with funding under an upcoming competitive selection process. Failure to proceed with respect to obligated funds will be governed by the terms of the Grant Agreement or ACC amendment, as applicable.

IV. Application Submission Requirements.

Each HOPE VI revitalization application must conform to the requirements of the HOPE VI Revitalization Application Kit, both in format and content. In addition to the forms, certifications and assurances required by Section II of the General Section of this SuperNOFA, each application must include the following, as directed by the application kit:

(A) A description of existing conditions that describes the extent of need for the program funds requested;

(B) Revitalization Plan which describes all revitalization activities to be funded in the application and details how the proposed work will be accomplished;

(C) For Revitalization applications, a description of plans for resident Self-Sufficiency Programs, including plans for resident consultation and documentation of resident involvement in the planning process;

(D) For Elderly Housing grant applications, a description of plans for resident services, including plans for resident consultation and documentation of resident involvement in the planning process;

(E) A proposed Management Plan which describes the capacity of the applicant and partners to carry out the plan, and proposed management principles which will be implemented to support revitalization efforts;

(F) Documentation of program financing and resources;

(G) A description of any capital funds received by the PHA within the past five years for improvement of the project, including but not limited to Modernization funding under section 14 and MROP funding.

(H) A program schedule.

(I) A certification that at least one public meeting was held to notify residents and community members of the proposed activities described in the application.

V. Corrections to Deficient Applications

The General Section of this SuperNOFA provides the procedures for corrections to deficient applications.

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24 CFR 941.102 printed in FULL format.

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*** THIS SECTION IS CURRENT THROUGH THE 7/28/98 ISSUE OF ***
*** THE FEDERAL REGISTER **

TITLE 24 -- HOUSING AND URBAN DEVELOPMENT
SUBTITLE B -- REGULATIONS RELATING TO HOUSING AND URBAN DEVELOPMENT
CHAPTER IX -- OFFICE OF ASSISTANT SECRETARY FOR PUBLIC AND INDIAN HOUSING,
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
PART 941 -- PUBLIC HOUSING DEVELOPMENT
SUBPART A -- GENERAL

24 CFR 941.102

§ 941.102 Development methods and funding.

(a) Methods. A PHA may use any generally accepted method of development including, but not limited to, conventional, turnkey, acquisition with or without rehabilitation, mixed-finance, and force account.

(1) Conventional. Under this method, the PHA is responsible for selecting a site or property and designing the project. The PHA advertises for competitive bids to build or rehabilitate the development on the PHA-owned site. The PHA awards a construction contract in accordance with 24 CFR part 85. The contractor receives progress payments from the PHA during construction or rehabilitation and a final payment upon completion of the project in accordance with the construction contract. The conventional method may be used for either new construction or rehabilitation.

(2) Turnkey. The turnkey method involves the advertisement and selection of a turnkey developer by the PHA, based on the best housing package for a site or property owned or to be purchased by the developer. Following HUD approval of the PHA's full proposal, the developer prepares the design and construction documents. The PHA and the developer execute the contract of sale to implement the PHA's full proposal. The developer is responsible for providing a completed housing project, which includes obtaining construction financing. Upon completion of project construction or rehabilitation in accordance with the contract of sale, the PHA purchases the development from the developer. This method may be used for either new construction or rehabilitation.

(3) Acquisition. The acquisition method involves a purchase of existing property that requires little or no repair work. Any needed repair work is completed after acquisition, either by the PHA contracting to have the work done or by having the staff of the PHA perform the work.

(4) Mixed-finance. This method involves financing from both public and private sources and may involve ownership of the public housing units by an entity other than the PHA. This method of development may be carried out by a PHA only in accordance with the requirements set forth in subpart F.

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(5) Force account. The force account method involves use of PHA staff to carry out new construction or rehabilitation. A PHA may only develop a full proposal based on the force account method if HUD has determined that the PHA has the capability to develop successfully the public housing units using this method.

(b) Funding. A PHA may develop public housing with:

(1) Development funds reserved by HUD for that purpose;

(2) Modernization funds under section 14 of the Act (42 U.S.C. 1437l), to the extent authorized by law and under procedures approved by HUD; and/or

(3) Funds available to it from any other source, consistent with § 941.306(c), or as may be otherwise approved by HUD.

(c) Limit on number of units. (1) General. A PHA may not develop public housing pursuant to this part beyond the lesser of the number of units that the PHA had under ACC on August 21, 1996, or the number of units for which it was receiving operating subsidy on that date, unless authorized by HUD. HUD may condition such authorization on the PHA's agreement that such incremental units, once developed, will be ineligible for capital and/or operating subsidies from HUD.

(2) Replacement housing units. With respect to units constructed to replace public housing units that were demolished or disposed of, a PHA may use (in whole or in part) funding from non-HUD sources or from HUD funding not provided under the Act. However, development of such units must be approved by HUD in advance for them to be eligible for inclusion under the ACC.

HISTORY:
[45 FR 60838, Sept. 12, 1980. Redesignated at 49 FR 6714, Feb. 23, 1984, and amended at 53 FR 8066, Mar. 11, 1988; 61 FR 38014, 38016, July 22, 1996]

AUTHORITY:
AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
42 U.S.C. 1437b, 1437c, 1437g, and 3535(d).

NOTES:
[EFFECTIVE DATE NOTE: 61 FR 38014, 38016, July 22, 1996, which revised this section, became effective Aug. 21, 1996.]
NOTES APPLICABLE TO ENTIRE TITLE:
CROSS REFERENCES: Farmers Home Administration, Department of Agriculture: For agricultural credit, see 7 CFR Chapter XVIII.
Office of Thrift Supervision, Department of the Treasury, 12 CFR Chapter V.
Department of Veterans Affairs regulations on assistance to certain veterans in acquiring specially adapted housing and guaranty of loans on homes: See Loan Guaranty, 38 CFR Part 36.

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HEADLINE: Cuomo Removes **Chicago Housing Authority** from Troubled **List**

CONTACT: U.S. Department of Housing and Urban Development, Office of Public Affairs, 202-708-0685; or Internet: http://www.hud.gov/news.html

DATELINE: CHICAGO, Aug. 1

BODY:
Housing and Urban Development (HUD) Secretary Andrew Cuomo today removed the **Chicago Housing Authority** from HUD's **list** of troubled public housing authorities and said HUD will return control of the CHA to the City of Chicago within eight months.

HUD will begin a transition next week to restore local control of the CHA to a new Housing Authority Board of Commissioners to be appointed in seven to eight months, Cuomo announced on a visit to the Henry Horner Homes public housing development in Chicago.

"For the first time since we began the current rating system for housing authorities in 1979, the **Chicago Housing Authority** is not on HUD's **list** of troubled public housing authorities," Cuomo said. "This major achievement shows that the partnership HUD formed with Mayor Daley and with CHA residents and staff to turn around the Authority has succeeded. Together, we've improved living conditions for residents and created new opportunities for them to get education, training and jobs that will help more become self- sufficient.

"This isn't the end of the process, it's the beginning," Cuomo said. " The tenants, the new hard-working management and the people of Chicago don't think this is as good as it gets, and neither do I. Now that the CHA is no longer on HUD's **list of troubled housing authorities,** we can move forward to begin returning control of the CHA where it belongs -- to the people of Chicago. This city has earned the right to run its own housing authority."

The previous CHA Board voted in May 1995 to transfer control of the CHA to HUD in a move to improve deteriorated living conditions at CHA developments and end years of management problems. Mayor Daley joined in the request, and HUD sent Assistant Secretary for Public and Indian Housing Joseph Shuldiner to Chicago to become Executive Director of the CHA -- a post he still holds.

HUD's new Public Housing Management Assessment Program rating for the CHA, issued today, gave the Authority a score of 64.69 out of a possible 100 points. At the time of the transfer of control of the CHA to HUD, the Authority's score on the Public Housing Management Assessment Program was just 51.

Under the rating system, which measures performance by public housing authorities in eight areas, an authority scoring below 60 is classified as troubled. HUD classifies only 51 of the nation's 3,400 public and Indian housing authorities as troubled.

The CHA Board voted itself out of business when it transferred control of CHA properties to HUD three years ago. During the transition period to return to local control of the CHA, a new board will be appointed and HUD will work closely with the CHA to ensure a smooth transition to oversight by the new board.

"As we are doing in communities around the nation, HUD is empowering the people of Chicago to play a greater role in shaping their future, with our strong support," Cuomo said. "We realize that people in Chicago know more about this city than we could ever learn in Washington and can do the best job improving their community."

The CHA, which is the third-largest housing authority in the United States, runs almost 39,000 units of public housing and administers rental assistance vouchers for another 20,000 privately owned apartments under the Section 8 program. CHA estimates that over 100,000 people live in these 59, 000 apartments.

HUD is providing operating subsidies of almost $184 million to the CHA this year.

Currently HUD runs only three housing authorities: Camden, N.J.; East St. Louis, Ill.; and New Orleans, where HUD is transitioning control back to the city. In addition, judicial receivers control housing authorities in: Kansas City, Kan.; Chester, Pa.; and Washington, D.C. The San Francisco Housing Authority transferred control to HUD under former Secretary Henry Cisneros, and regained local control under Secretary Cuomo.

The Public Housing Management Assessment Program measures the

1) Percentage of vacant apartments and the time it takes to fill vacant apartments.

2) Management of the modernization program to upgrade apartments.
3) The success of rent collection efforts.
4) Performance of repairs and general maintenance on apartments.
5) Adequacy of physical inspections of apartments performed by a housing authority.

6) Overall financial management.
7) Programs to help residents become self-sufficient by providing such things as education, job training and child care.

8) Anti-crime efforts, including use of HUD's Drug Elimination Grants, working with local police, and carrying out the One Strike program to keep criminals out of public housing and remove those already there.

LANGUAGE: ENGLISH

CERTIFICATE OF SERVICE

I, Nancy Eisenhauer, an attorney, hereby certify that on Monday, August 17, 1998, I caused a copy of the foregoing REPLY BRIEF OF DEFENDANTS-APPELLANTS CHICAGO HOUSING AUTHORITY AND JOSEPH SHULDINER to be served by hand delivery and facsimile (without exhibits) on counsel listed below:

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